No. 93-1286

In The

Supreme Court of the United States

October Term, 1994

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

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QUESTIONS PRESENTED

1. Does the Airline Deregulation Act of 1978, which contains no federal enforcement mechanism for breach of contract, preclude members of a frequent flyer program from bringing a common law breach of contract claim for money damages against an airline?

2. Does the Airline Deregulation Act of 1978 preclude members of a frequent flyer program from bringing a claim under a state consumer fraud statute against an airline when the airline's breach of contract constitutes a deceptive practice?

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OPINIONS BELOW

In addition to the opinions and judgments listed in the Brief for Petitioner ("Pet. Brief") at 1, the following relevant opinions and judgments have been delivered in this case: *Wolens v. American Airlines, Inc.*, 207 Ill. App. 3d 35, 565 N.E.2d 258 (1st Dist. 1990) (Pet. App. at 31a);[1]

[1] References to the Appendix to the Petition for Writ of Certiorari are cited as "Pet. App. at ___." References to the Appendix to Brief of Respondents in Opposition to Petition for Writ of Certiorari are cited as "Opp. App. at ___." References to the Joint Appendix are cited as "App. at ___."

Wolens v. American Airlines, Inc., No. 88 CH 7554, slip op. (Ill. Cir. Ct. March 20, 1989) (Pet. App. at 41a); and *Wolens v. American Airlines, Inc.*, No. 88 C 8158, 1988 U.S. Dist. LEXIS 12026 (N.D. Ill. October 25, 1988) (decision to remand state court action) (Opp. App. at 1a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the express pre-emption provision of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. App. § 1305(a)(1) ("Section 1305") (Pet. Brief at 2), the statutory section which saves existing remedies provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. App. § 1506 ("Section 1506").

STATEMENT OF THE CASE

Plaintiffs allege that Petitioner American Airlines unilaterally and retroactively breached its contract with Plaintiffs, members of American's "frequent flyer" club known as the AAdvantage Program. American's breach devalued credits already earned by Plaintiffs. The claims at issue seek money damages only.[2]

[2] While Plaintiffs initially sought injunctive relief, they have not appealed the holding of the lower court that the claim for an injunction is pre-empted.

This case is before the Court on a Motion to Dismiss Plaintiffs' complaints. Under Illinois procedural law, all well-pleaded facts in the complaints must be taken as true by the reviewing court and the allegations must be interpreted in the light most favorable to plaintiffs. *Munizza v. City of Chicago*, 222 Ill. App. 3d 50, 583 N.E.2d 561 (1st Dist. 1991), *citing*, *Bio-Medical Lab., Inc. v. Trainor*, 68 Ill. 2d 540, 370 N.E.2d 223 (1977) (motion to dismiss admits well-pleaded facts).[3] The complaints allege the following facts:

A. The AAdvantage Program.

American initiated the AAdvantage Program contract in 1981 as a marketing venture. To enhance the Program, American obtained the participation of non-airline businesses including hotels, bank credit cards, a long distance telephone network, car rental agencies, money market funds, sellers of merchandise and other airlines ("Program Participants" Pet. App. at 48a-49a, ¶ 1.

The relationship between American and AAdvantage Club members is contractual, with the terms contained in the terms and conditions of the AAdvantage Program. Pet. App. at 49a, ¶ 2. *See* AAdvantage Program Brochure

[3] Because this case involves the sufficiency of the complaints, Plaintiffs have not been able to create a record to refute the many untested (and largely irrelevant) factual assertions in American's brief. *See, e.g.*, Pet. Brief, *passim* (arguing that damage awards would inhibit competition, disrupt operations, and possibly lead to termination of frequent flyer programs); Pet. Brief at 6, 35 (arguing airline's administration of Program has benefited consumers); Pet. Brief at 14 (regarding how complying with contract would have impacted American).

("Program Brochure") lodged with the Court by American on June 2, 1994.[4] Under the contract, persons who belong to the AAdvantage club earn credits by doing business with American or Program Participants. AAdvantage club members can earn credits and obtain benefits without ever flying.[5] *See, e.g.*, Program Brochure; AAdvantage Mastercard/Visa Brochure, lodged with Court by American on June 2, 1994. Club members redeem the credits for various benefits offered by American and the Program Participants.

Plaintiffs joined the Program and accumulated credits from American and Program Participants, even if doing so was more costly and less convenient than doing business with others. Pet. App. at 49a-50a, ¶¶ 3-4; Pet. App. at 62a-63a, ¶ 5.

B. The Breach Of Contract

In late spring of 1988, after American had received the benefit of its bargain with club members, American retroactively imposed restrictions on members' use of their previously earned credits, unilaterally altering the

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[4] American's assertion that Plaintiffs allege an "implied contract" is incorrect. Pet. Brief at 3. The writings explaining the AAdvantage Program and setting forth its terms constitute an express contract.

[5] While non-airline travel benefits are involved in the AAdvantage Program, American claims that such benefits "were not challenged." Pet. Brief at 5. This is misleading. By breaching its contract with AAdvantage club members, American diminished the value of the credits which club members earned from the Program Participants as well as from American.

terms of its contract with the members.[6] Pet. App. at 52a, ¶ 14; Pet. App. at 65a, ¶ 14. These restrictions substantially reduced the value of credits members previously earned. Pet. App. at 49a-50a, ¶ 4; Pet. App. at 63a, ¶ 6.[7] Although American had reserved the right to restrict, suspend, or otherwise alter aspects of the Program prospectively,[8] it never reserved the right to retroactively diminish the value of the credits previously earned by members.

C. The Claims At Issue.

Plaintiffs, residents of Illinois, California, Connecticut and Texas, filed suit on behalf of themselves and all other club members. Plaintiffs allege that American's restrictions constituted a breach of contract and were a

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[6] Members no longer were entitled to an airplane ticket for any available seat on any flight at any time, but instead to only a limited number of seats designated on each flight (capacity controls). In addition, travel during popular holiday periods, previously available, was precluded (blackout dates).

[7] American misstates the *Tucker* complaint, asserting that Plaintiffs allege that American "raised the rate" for airline tickets obtained with AAdvantage credits. Pet. Brief at 8. Plaintiffs actually alleged that "American breached its contract" by, among other things, "reducing the number of available seats pursuant to which earned mileage credits can be used for benefits, thereby reducing the value of mileage credits. . . . " Pet. App. at 66a, ¶ 20.

[8] Thus, Plaintiffs do not request the state court to void any express limitations contained in American's AAdvantage Program contract. Plaintiffs only seek damages for breach of the express terms of that contract.

deceptive business practice violating the Illinois consumer fraud statute. Plaintiffs ask only for money damages resulting from American's wrongdoing.[9]

American justifies its retroactive unilateral changes to the AAdvantage Program by arguing that it did not anticipate the success of the Program. Pet. Brief at 6. However, whether American anticipated large accumulations of credits is outside the record and immaterial to whether Plaintiffs have the right to pursue their claim for damages, based on a private agreement. American created the Program, set the terms, and voluntarily contracted with club members. Moreover, American encouraged accumulation of large numbers of credits by making credits more easily obtainable through the use of credit cards, rental cars, hotels, long distance telephones, and other non-airline sources, as well as through promotions such as "triple mileage" where members obtained three times the normal credits. Pet. App. at 56a, ¶ 14. That American in hindsight believes it agreed to terms too generous is irrelevant.[10]

American's references to its desire to adjust the Program contract to achieve certain competitive goals are

[9] The complaints also pray for an award of punitive damages. Plaintiffs concede that punitive damages traditionally have not been recoverable for a simple breach of contract. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting). Consequently, the prayer for punitive damages in Count II should be stricken.

[10] While American suggests that its modifications to the AAdvantage Program have been beneficial (*see* Pet. Brief at 6), that assertion is not supported by any facts in the Record. Moreover, it is irrelevant to the predicate question of whether Plaintiffs can assert their claims.

also immaterial. *See* Pet. Brief at 15, 18-20, 27-29, 34. The claims do not seek to prevent American from changing the AAdvantage Program in any way. Plaintiffs are entitled to pursue their claim for damages based on the *retroactive* impact of the changes.

D. Judicial Proceedings

1. The District Court Remand.

Before filing its Motion to Dismiss, American removed the cases to the United States District Court for the Northern District of Illinois. The district court remanded, holding that American's pre-emption defense did not transform the state claims into federal claims. Opp. App. at 4a-6a.

2. The Illinois Supreme Court's Initial Decision.

After the trial court denied American's Motion to Dismiss (Pet. App. at 41a) and an intervening appellate court affirmed (Pet. App. at 31a), the Illinois Supreme Court held that Section 1305 did not pre-empt Plaintiffs' breach of contract and consumer fraud claims for money damages because those claims had only a "tangential relationship to (American's) rates and services. . . ."[11]

[11] While this basis for the Illinois Supreme Court's ruling proved to be consistent with the later construction of this Court in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), the Illinois Supreme Court did err by holding that "Section 1305(a)(1) pre-empts claims only when the underlying statute or

The court also held that Section 1305 pre-empted Plaintiffs' claims for injunctive relief since such relief would effectively result in the regulation of American's services by a state court. Pet. App. at 23a.

3. The Illinois Supreme Court's Decision on Remand.

After *Morales*, the Court granted American's petition for certiorari and remanded to the Illinois Supreme Court for reconsideration in light of the Court's construction of Section 1305.

On remand, the Illinois Supreme Court reaffirmed that Plaintiffs' claims for money damages were not pre-empted:

> Accordingly, we conclude that our previous holding, that Plaintiffs' claims for money damages was not pre-empted because it bears only a *tangential* relation to airline rates, routes and services, comports with the *Morales* decision. As defined, the word "tangential" is described as: "touching lightly or in the most *tenuous* way: Incidental." (Emphasis added.) (Webster's Third New International Dictionary 2337 (1986).) . . . The claims are excluded [from pre-emption] by the exception carved out in *Morales* for actions only tenuously connected to the airlines' rates, routes and services.

Pet. App. at 6a-7a (emphasis added).

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regulation itself relates to airline services, regardless of whether the claim arises from the factual setting involving airline services." Pet. App. at 23a.

The Illinois Supreme Court closely followed *Morales'* analytical framework. Pet. App. at 3a-5a. The court first considered the nature of the contract that American breached and the wrongdoing complained of. Pet. App. at 5a-6a. The court described the claims, recounting Plaintiffs' contention that American retroactively changed the AAdvantage Program so as to diminish the value of AAdvantage club members' previously-earned credits. *Id.* The court also noted that the AAdvantage Program was developed and utilized as a marketing device, and that Plaintiffs did not seek any prospective relief. *Id.* Next, the court considered whether the damages claims were tenuous, remote, or peripheral to airline rates, routes and services. Pet. App. at 6a. The court found that the damages claims did not seek to establish the rates that airlines must charge, to determine the routes that airlines must fly, or to dictate the services that airlines must provide. *Id.* The court concluded that the "claims for money damages bear only a tangential, or tenuous, relation to American's rates, routes, and services." Pet. App. at 7a.

Despite American's contention to the contrary (Pet. Br. at 23), the Illinois Supreme Court did not create a new legal standard based on whether the state law claims relate to "essential" airline operations. While the court noted that the AAdvantage Program was not "essential" to airline operations, the court discussed that fact as one of many facts it considered in evaluating whether the Plaintiffs' claims fit into the "tenuous", "remote," or "peripheral" exceptions carved out in *Morales*.

SUMMARY OF ARGUMENT

American's AAdvantage Program is entirely voluntary (a consumer must fill out an application to join) and contractual, its terms being based on the rules, regulations and restrictions chosen solely by American.

Under the contract, members (Plaintiffs) received valuable credits exchangeable for various goods and services by agreeing to do business with American and the Program Participants. Members performed their end of the bargain by choosing American and the Program Participants over competitors even when the competitors' services or products were less expensive or more convenient.

In 1988, American breached its contract by unilaterally imposing capacity control and blackout date restrictions, decreasing the value of the credits which members had already earned. These restrictions violate the members' contracts only because they were imposed retroactively on credits previously earned by Plaintiffs. American reserved for itself the right to prospectively make changes in the contract terms to which the parties voluntarily agreed.

Plaintiffs seek to recover money damages for the diminution in value of their credits arising out of American's breach. Plaintiffs also seek damages pursuant to the Illinois Consumer Fraud and Deceptive Practices Act, for their accumulation of large numbers of credits through American's promotion of a triple miles program, when American knew it would shortly thereafter devalue the credits by imposing the restrictions.

American, attempting to avoid the consequences of its breach, claims that Section 1305(a)(1) of the Airline Deregulation Act of 1978 ("ADA") pre-empts Plaintiffs' causes of action because the contract relates to airline rates or services. This argument, which has failed at each previous judicial level, runs contrary to the language and purpose of the ADA, as well as this Court's ruling in *Morales v. Trans World Airlines*, 112 S. Ct. 2031 (1992). In enacting the ADA, Congress assumed the continued existence of private contracts and the continued existence of state law remedies for breach of contracts. Section 1305(a)(1) assures that the states will not "undo" the ADA's deregulatory purpose by imposing their own normative standards on airlines' rates, routes and services. *See Morales*, 112 S. Ct. at 2033.

The Program is a separate business run by American for itself and its Program Participants. Members need never fly to accumulate credits. The Program contract does not relate to the rates, routes or services of American's business of transporting persons and cargo in more than a remote, peripheral or tenuous manner, if at all.

Section 1305 shows no "clear and manifest" intent to prevent persons doing business with airlines from seeking compensatory damages to enforce the terms of voluntary contracts. Further, the ADA does not provide for any federal remedies or administrative procedures. Therefore, the ADA has not expressly supplanted common law claims.

Morales is similar to the case at bar only in that the issue there was the scope of Section 1305. In stark contrast with the proposed fare advertising regulations in

Morales, Plaintiffs' garden-variety breach of contract claims will not "undo federal deregulation." Plaintiffs seek only damages for American's past breach of the AAdvantage contract, unrelated to the air transportation rates, routes or services that Congress deregulated. Plaintiffs do not seek to create any rules, regulations or standards for American's future behavior, the types of normative standards which Congress intended to pre-empt.

American seeks immunity from its own wrongful conduct. That was not the intent which motivated Congress to enact Section 1305. Adopting American's argument that the ADA pre-empts all claims touching even indirectly on American's decisions as to its rates, routes or services would mean pre-empting virtually any claim one could conceivably have against an airline. Not only would members of the AAdvantage Program have no remedy for American's breach of contract, but no one else contracting with American would be able to enforce their agreements or receive monetary damages for American's breach. It is inconceivable that Congress intended, by *deregulating* the airline industry, to give the airlines immunity from suits narrowly based on their private agreements, especially when those agreements have no significant impact on the rates airlines charge, the routes they fly or the air transportation services they provide.

ARGUMENT

I. SECTION 1305(a)(1) DOES NOT PRE-EMPT STATE LAW CLAIMS FOR BREACH OF CONTRACT.

In *Morales*, the Court confronted the issue of whether the enforcement by state attorneys-general of comprehensive regulations pertaining to the advertising of airline rates was subject to pre-emption under Section 1305. The Court found the facts of *Morales* to present an extreme position on the pre-emption line, contrasted to gambling and prostitution, which were found to be on the opposite end of the spectrum. 112 S. Ct. at 2040.

The instant case presents circumstances which fall between the extremes. The question is whether Congress intended to pre-empt common law contract claims. Did Congress explicitly intend to strip away all state law protection? The answer is no, for the reasons we now explain.

A. The Statutory Language Of The ADA Manifests Congress' Intent That Plaintiffs' Breach Of Contract Claim Is Not Pre-Empted.

In enacting the ADA, Congress deregulated the airlines to promote "maximum reliance on market forces," and to further "efficiency, innovation and low prices" as well as "variety [and] quality of air transportation services." *Morales*, 112 S. Ct. at 2034. The principal goal of deregulation was to serve the interests of consumers by compelling airlines to compete in a free market with respect to their rates, routes and services.

Congress enacted Section 1305 to assure that states did not regulate airlines' rates, routes and services in an anti-competitive manner, with the effect of nullifying the dividends of deregulation. At the same time, Congress decided against repealing or limiting Section 1506 of the Federal Aviation Act of 1958 ("FAA"), Pub. L. No. 85-726, 72 Stat. 721, which expressly saves from pre-emption "the remedies now existing at common law or by statute."

Whether Congress intended to insulate airlines from the breach of their own voluntary agreements is the critical question in this case. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (congressional intent is the touchstone of the pre-emption inquiry). The Illinois Supreme Court's ruling that the Plaintiffs' suit for damages was not pre-empted by the ADA is fully consistent with congressional intent ascertained through the application of the facts of this case to pre-emption principles, the ruling in *Morales*, and the language and purposes of the ADA.

American argues, in substance, that Section 1305 pre-empts a cause of action that relates, in any way, to airline rates, routes and services. But that concept sweeps so expansively as to eliminate virtually any claim against an airline. Almost everything an airline does has at least a tenuous connection to its rates, routes or services. The ADA's language and policy demonstrate that such broad pre-emption was not Congress' intent.

1. In Determining The Meaning Of A Pre-Emption Provision, The Court Looks To A Number Of Sources.

While the Court considers the plain meaning of the words, it does not consider them in isolation, referring as well to "the purposes of the pre-emption provision, and the regulatory focus of [the statute] as a whole." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987). The Court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987), *citing Kelly v. Robinson*, 479 U.S. 36, 43 (1986). *See also Watt v. Alaska*, 451 U.S. 259, 267 (1981) (statutes must be construed to give effect to all provisions if possible). The Court also considers congressional and regulatory interpretations of the statute. *See, e.g., Massachusetts v. Morash*, 490 U.S. 107, 116-17 (1989) (deferring to agency's interpretation of ERISA pre-emption language); *Cipollone*, 112 S. Ct. at 2620 (considering legislative history and purpose of Act).

If the Court finds that the pre-emption provision is "susceptible of more than one interpretation," it should conclude that the provision does not "demonstrate a clear and manifest congressional purpose" to pre-empt. *Hawaiian Airlines, Inc. v. Norris*, 62 U.S.L.W. 4537, 4540 (U.S. June 20, 1994) (Court considered statute's "comprehensive framework," which pre-empted many claims, in light of rest of statutory language as well as statute's purpose and legislative history; concluded Congress's intent to pre-empt particular claim at issue was not "clear and manifest", therefore state law claim was not pre-empted).

In this case, these sources establish that Plaintiffs' breach of contract claim is not pre-empted.

2. The Text Shows Congress' Intent To Preserve Breach of Contract Actions.

The ADA's text confirms the continued vitality of airline contracts.[12] As the Solicitor General argues, Congress contemplated that the airlines' services would be identified in its contractual agreements which would form the basis for calculating civil damages in the event the airline breached its voluntary contractual duties. Brief for the United States as Amicus Curiae ("Sol. Gen. Br.") at 19.

Private contracts are meaningless, however, unless there is a mechanism to enforce them or obtain damages

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[12] Section 1381 (Section 411 of the FAA), for example, provides that "[a]ny carrier may incorporate by reference in any ticket or other written instrument any of the terms of the *contract of carriage*." 49 U.S.C. App. § 1381(b) (emphasis added). Section 1371(q)(2), which provides for the filing of performance bonds, conditions such bonds upon "making appropriate compensation to such travelers . . . for failure on the part of such carrier to perform air transportation services in accordance with *agreements* therefore." 49 U.S.C. App. § 1371(q)(2) (emphasis added). Further, a "contract of carriage" is a contract for the "conveyance of property [or] persons . . . from one place to another." Black's Law Dictionary 269 (4th Ed. 1951). Any "contract of carriage" would "relate to" airline services by definition, under American's interpretation of Section 1305. Since such a reading is contrary to the statutory language, the pre-emption phrase of "relating to" must be limited by the type of state action pre-empted.

for their breach.[13] Indeed, the ADA assumes the binding character of airline contracts.[14]

At the same time Congress recognized the vitality of private contracts in the ADA, it did not create any federal remedies for breach of contract nor any administrative apparatus for the DOT to adjudicate a private contract dispute between an airline and a member of its frequent flyer club.[15] As the Solicitor General notes "to do so would be contrary to the ADA's basic deregulatory thrust." Sol. Gen. Br. at 22.[16] By recognizing the vitality of

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[13] American concedes that a "contract has no legal force apart from the law that acknowledges its binding character." Pet. Brief at 22 n.30.

[14] For example, the implication of Section 1371(q)(2)'s bond requirement and statements about compensation is that an airline's "failure" to comply with agreements would be subject to adjudication and that damages would be available for a breach. The bond requirement is similar to Section 1371(q)(1)'s requirement for insurance to ensure payment for negligence actions. *See Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 355 (5th Cir. 1993). Both sections assume the existence of common law actions.

[15] Federal common law would not be a source of recovery here. *See Miree v. DeKalb County*, 433 U.S. 25, 28-33 (1977) (holding that federal common law did not apply to contract dispute between county and Federal Aviation Administration); *O'Melveny & Myers v. FDIC*, 62 U.S.L.W. 4487, 4488 (U.S. June 13, 1994) (refusing to create federal common law on the question of the imputation of corporate officers' knowledge to a corporation). Thus, American would remove the only protection available to Plaintiffs, who have no other legal remedy for American's breach of contract.

[16] In this respect, the ADA differs radically from ERISA which provides for a federal cause of action, details available remedies and creates a comprehensive civil enforcement scheme. Thus, American's reliance on *Pilot Life Ins. Co. v.*

individual contracts without creating a federal enforcement mechanism, Congress demonstrated its intent to preserve the state's traditional role in enforcing contracts entered into by airlines. *Cf. Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837-38 (1988) (by recognizing that ERISA welfare plan benefits could be attached or garnished under state statute, Congress' decision to remain silent concerning an attachment or garnishment acknowledged or accepted the practice rather than prohibiting it).

That Congress intended airlines to be exposed to liability for breach of private contracts is further evidenced by Section 1506, first enacted in 1938 and then again in 1958. *See* FAA, Pub. L. No. 85-726, § 1106, 72 Stat. 798. Congress also chose not to repeal Section 1506 in enacting the ADA. Section 1506, which expressly preserves "the remedies now existing at common law or by statute" must be read in conjunction with Section 1305. Congress intended to preserve some common law and statutory actions despite Section 1305's pre-emption language. Given the purpose of the ADA to undo regulation over airlines' rates, routes and services, as the Solicitor General suggests, Section 1305 does not preclude the customary remedies to a party claiming that an airline breached a voluntary private contract with a customer,

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Dedeaux, 481 U.S. 41, 54 (1987) and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), is misplaced. Both cases are premised upon "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal [ERISA] scheme." *Pilot Life*, 481 U.S. at 54.

although it may bar a state from enforcing its own normative standards with respect to rates, routes, or services. Sol. Gen. Br. at 16-17. Section 1506 preserves "the customary remedies."

3. The ADA's Legislative History Demonstrates That Congress Intended To Pre-Empt Only State Actions Imposing Policy Standards On Airline Rates, Routes Or Services.

A section-by-section analysis of a precursor to the ADA (which included the provision ultimately codified as Section 1305) provides commentary on the purpose of the pre-emption provision:

> With the passage of legislation . . . loosening Federal regulation of airline services and fares, it is possible that some states will enact their own regulatory legislation, imposing restrictive utility-type regulation on interstate airline service and fares. The Air Service Improvement Act includes a specific statutory provision precluding state interference with interstate service and fares.

123 Cong. Rec. 30595 (1977) (comments of representative Glen Anderson). The House Report contains similar language:

> H.R. 12611 will prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, *no state may regulate that carrier's routes, rates or services.*

H. R. Rep. No. 1211, 95th Cong., 2d Sess. (1978) at 16 (emphasis added). The conflicting regulations which the

pre-emption provision was intended to cure included carriers being required by states to charge different fares for interstate versus intrastate passengers. *Id.* at 16.

4. The DOT And The Solicitor General Support Plaintiffs' Right To Pursue Their Breach Of Contract Claim.

The DOT has consistently and without reservation stated that frequent flyer program contract disputes are private matters to be resolved in civil courts.[17] Indeed, American has repeatedly availed itself of state courts for common law claims relating to breaches of frequent flyer program contracts.[18]

DOT's ruling in *Complaint and Rulemaking Petition of Association of Discount Travel Brokers*, Docket Nos. 46280, 47539 (DOT Order, May 29, 1992) (Pet. App. at 85a), and the airlines' arguments in that matter, support Plaintiffs. The Association of Discount Travel Brokers, whose members purchase and sell frequent flyer awards, sought to

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[17] Sol. Gen. Br. at 26, n. 21, *citing* DOT Order Denying Rulemaking of May 29, 1992 (Pet. App. at 96a & n. 17) and DOT Order 89-9-25 of Sept. 13, 1989. *See also* United States Dep't of Transportation, *Plane Talk: Facts For Air Travelers From The Consumer Affairs Office* 2 (1992).

[18] *See, e.g., American Airlines, Inc. v. American Coupon Exch., Inc.*, 721 F. Supp. 61, 63 (S.D.N.Y. 1989) (finding that American's complaint contained "sufficient allegations of the existence of a contractual relationship between plaintiffs and frequent flyers who sold their travel rights. . . . "); *American Airlines, Inc. v. Platinum World Travel* (complaint filed in U.S. District Court for the District of Utah, alleging tortious interference and fraud). App. at 11-53.

require DOT to establish nationwide standards for frequent flyer programs. Pet. App. at 90a-91a. In opposing the proposed rulemaking, American argued, among other things, that DOT lacked jurisdiction to regulate frequent flyer programs since those programs extend beyond airlines. Pet. App. at 92a-93a.

Further, the airlines stressed that their agreements with members of their frequent flyer programs, which prohibit the purchase and sale of frequent flyer awards, were "valid and enforceable contractual restrictions on assignment. . . . " Pet. App. at 91a. The airlines described their frequent flyer programs as "legitimate contract[s]" governed "solely by contract law." Pet. App. at 89a. The DOT agreed:

> Continental correctly describes the relationship between frequent flyer programs and their members as a *contract* in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier.

Pet. App. at 96a (emphasis added).

Contrary to American's argument (Pet. Brief at 33-34), the DOT did not consider the claims at issue here, nor did it conclude that an air carrier can breach its contractual obligations without being held liable for money damages under state law. DOT's statement, that certain methods of controlling the cost of frequent flyer programs are not *per se* illegitimate, is not conclusive here. The DOT did not address the question in this case: whether American can be held liable for damages under state law if its institution of cost controls breaches a contract. Indeed, the DOT order supports the conclusion

that state common law of contracts, rather than government regulation, should resolve that question.[19]

American suggests that Congress intended that the DOT would ensure appropriate compensation for breach of contract. Pet. Br. at 15. But neither Section 1371(q)(2), Section 411, nor any other provision of the ADA, anticipates or arranges for the DOT to adjudicate garden-variety contract disputes involving airlines.[20] In *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 301-2 (1976), this Court flatly rejected American's construction of Section 411, holding that the Civil Aeronautics Board (DOT's predecessor) "may not employ its powers to vindicate private rights" and that "individual consumers are not even entitled to initiate proceedings under § 411."[21] By

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[19] American suggests that only federal *regulation* through DOT can assure a "competitive and financially sound" airline industry. Pet. Brief at 32-33. But the ADA *deregulated* the airline industry, as the DOT clearly recognizes, leaving airlines to compete in a free market, subject to common law breach of contract actions.

[20] American relies on a quote, taken out of context, from *Northwest Airlines Inc. v. County of Kent*, 114 S. Ct. 855, 863 (1994) for the proposition that DOT, rather than courts, should regulate the claims here. But *Northwest* dealt specifically with the agency's ability to oversee the setting of airport rates and fees – not the adjudication of breach of contract claims. Moreover, *Northwest* merely commented that it would have given deference to the agency had it ruled on the rate-setting issue; it did not pre-empt the private claim, and did not address the ADA's pre-emption provision.

[21] Moreover, to the extent Section 411 gives the DOT "authority" to protect consumers, exercise of that authority is entirely discretionary and the provision creates no private right of action for an aggrieved party.

enacting the ADA without altering Section 411, Congress is presumed to have adopted *Nader*'s interpretation of Section 411. *See Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978).

The DOT itself rejects American's interpretation. *See* Sol. Gen. Br. at 19-20. DOT regulations recognize state causes of action against airlines for breach of contract. The DOT says, for example, that airlines are *"subject to the contract law of the states* in issuing ticket contracts." 47 Fed. Reg. 52,129, 52,130 (1982) (emphasis added). DOT regulations require carriers to give passengers notice of "[r]ights of the carrier to change terms of the *contract*" and require carriers to notify passengers of the time period to *"bring an action* against the carrier for its acts." 14 C.F.R. 253.5(b)(3); 14 C.F.R. 253.5(b)(2) (emphasis added).

Moreover, nothing in the ADA suggests that Congress intended that the DOT be the sole arbitrator of the potentially thousands of contract disputes between airlines and passengers or anyone else (such as a frequent flyer club member) who contracts with an airline. The practicalities make it obvious that Congress could not have intended that result. As pointed out by the Solicitor General, the DOT does not have a comprehensive administrative apparatus for adjudicating disputes arising under contracts between airlines and their passengers. Rather, Congress intended to rely – as the DOT has relied – on the availability of state courts for the resolution of such disputes. *See* Sol. Gen. Br. at 3, 19, 25-27. It is inconceivable that Congress would create a burdensome regulatory scheme under the ADA without expressly providing for it. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*,

451 U.S. 630, 643-644 (1981) (finding no "unmistakably clear" expression of congressional intent to create a federal common-law right of contribution from antitrust co-conspirators).[22]

In summary, American's assertion that Section 1305 pre-empts "*any* causes of action that relate to rate, routes, or services" (Pet. Brief at 14) yields a ludicrous result: that Congress intended to pre-empt and at the same time endorse the continued existence of private contracts. Equally ludicrous, Congress could not have intended to eliminate "without comment . . . all means of judicial recourse" for breach of contract. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Construing the ADA to give effect to all of its provisions, and considering its lack of enforcement mechanisms, requires a finding that the ADA does not pre-empt breach of contract claims like the claim here.

B. Plaintiffs' Claim Does Not Implicate "Rates, Routes Or Services" And Is The Type Of Contract Claim Congress Intended To Preserve.

The Civil Aeronautics Board, in implementing the ADA, indicated that Congress extended pre-emption only

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[22] Even where Congress has developed a comprehensive mechanism for resolving disputes, the Court has found that particular claims are not pre-empted absent a clear and manifest expression of congressional intent to pre-empt them. *Hawaiian Airlines*, 62 U.S.L.W. 4537 (finding state tort and statutory causes of action alleging wrongful discharge from employment were not pre-empted despite the Railway Labor Act's "comprehensive framework" for handling labor disputes).

to the *quid pro quo* for the air passenger's fare, including the flight service, length and frequency of flights, seating assignments, and boarding practices. *See* 44 Fed. Reg. 9948, 9951 (1979).

The AAdvantage Program contract is unrelated to the *quid pro quo* for air transportation. The Program is a multimillion dollar marketing venture distinct from American's business of transporting passengers and cargo. Numerous non-airline businesses pay American to become Program Participants. *See* United States Dep't of Transportation, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices* (Feb. 1990) at 32.

Members need not ever fly to accumulate credits and they can redeem credits for a variety of benefits unrelated to air travel. American has agreed to provide credits to club members who use an American vanity bank charge card, stay at certain hotels, rent cars, use a long distance network, invest in a specified money market fund, do business with a variety of Program Participants or fly. *See id.* at 32; Program Brochure.

More than seventy-five percent of airline passengers do *not* belong to frequent flyer programs (*id.* at 31), and club members and non-club passengers are subject to the same rates. Thus, while amicus United Air Lines argues that frequent flyer programs are integral to airline fares (United Brief at 6), in fact, the airfares and transportation services provided are the same regardless of whether the traveller is a member of the AAdvantage club.

American created – and voluntarily agreed to – the contractual terms of the Program completely apart from

the contract for air transportation. Plaintiffs' claim, relating only to the AAdvantage Contract, simply seeks money damages for the devaluation of already earned credits – it does not have any effect on American's flight services, seating assignments, boarding practices, prices, or any other aspect of the air transportation bargain.

Congress did not pre-empt claims relating to every conceivable business in which an air carrier chooses to participate. It confined pre-emption to claims relating to airline "rates, routes and services." Claims based on breach of the AAdvantage Program do not relate to rates, routes or services.[23] A "rate" is a "charge, payment or price fixed according to a ratio, scale or standard." *Webster's Ninth New Collegiate Dictionary* at 976 (1987). In the FAA, Congress refers to "rates" as something which an air carrier must "establish, observe, and enforce." 49 U.S.C. App. § 1374(a). In other words, the "rate" is a charge – set by American – which must be paid. Plaintiffs' claims here are unrelated to American's charges for any airline services; they do not seek damages for unfair or improper rates or changes to American's rate structure or fares. Instead, they seek damages arising from American's devaluation of the credits that Plaintiffs earned in performing their end of the bargain as members of the AAdvantage Program. This is distinct from the air transportation bargain.[24]

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[23] American does not argue that Plaintiffs' litigation relates to "routes." *See* Pet. Brief at 17-20.

[24] A substantial damage award in a negligence action or a breach of contract case could ultimately be reflected in a decision by American to increase rates. That, however, would not justify pre-emption. Virtually everything that affects a business may impact prices. Congress clearly did not pre-empt claims on everything related to airlines. *Cf. Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 488 U.S. 493 (1989) (although Natural Gas Act gave federal government exclusive authority to regulate rates for natural gas, state regulation of production of gas was not pre-empted even though it would have impact on costs and thus affect rates).

The damages Plaintiffs claim also do not relate to "services". The term "services" means the bargained-for provision of labor from one party to another. *Hodges v. Delta Airlines Inc.*, 4 F.3d 350, 354 (5th Cir. 1993). As described *supra*, CAB understood airline services to have this meaning – extending pre-emption only to the services constituting the *quid pro quo* for fares. By seeking damages for the devaluation of earned credits, Plaintiffs make no claims and seek no relief connected to American's air transport services.

If American's interpretation of the ADA were correct, then an airplane manufacturer could not sue an airline for failing to pay for an aircraft; a passenger injured or killed in an air crash could not sue the airline for negligence; a newspaper that is not paid for an airline's advertisement of rates could not enforce its contract and neither could a passenger whose paid ticket is not honored.[25] The list is endless – as virtually every activity in

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[25] It would be illogical to allow common law tort actions and pre-empt breach of contract actions as both are areas traditionally within a state's interest. Indeed, if any distinction is to be drawn, such distinction compels survival of common law breach of contract actions since a tort duty is not voluntarily entered into but imposed by state law. *See* Oliver Wendell Holmes, Jr., *The Common Law* at 77 (1938).

which an airline engages is connected, at least tenuously, to the rates the airline charges, the routes it flies, or the services it provides. If the "relating to" language is construed as American proposes, airlines would be free to breach contracts, act negligently or defraud people, without consequences.

C. Under *Morales*, Plaintiffs' Damage Claims Are Not Pre-Empted.

1. *Morales* Recognizes Limits To The Scope Of Pre-Emption Under Section 1305.

While American argues that this case is "indistinguishable" from *Morales*, Pet. Brief at 14, there is little similarity, and a multitude of significant distinguishing features. *Morales* involved the broad *regulation* of the advertising of *rates* by state attorneys-general who sought to *impose state policy* on the airlines as set out in a written standard of prosecutorial guidelines. The Court found that the prosecutorial guidelines "obviously" related to rates since they "establish binding requirements as to how tickets may be marketed if they are to be sold at a given price." 112 S. Ct. at 2039. The *Morales* Court stressed that the guidelines would not simply prevent "market distortion caused by 'false' advertising," but would restrict air carriers' "ability to communicate fares to their customers." *Id.* at 2040. Thus, *Morales* found the "[s]tate enforcement actions" to be pre-empted. *Id.* at 2037.

In contrast, Plaintiffs – private parties rather than the state – seek money damages, not regulation, resulting from a breach of a private contract implicating no state

policy. Their damage claim, unlike the claim in *Morales*, involves no "state enforcement action", no "restrictions" and no "binding requirements" on airlines' rates.

The Court explicitly recognized limits to pre-emption under Section 1305: " 'some state actions may affect [airline rates, routes, or services] in too tenuous, remote,, or peripheral manner' to have pre-emptive effect." *Id.* at 2040, *quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983). The Court declined to establish a bright-line rule for distinguishing pre-empted claims from non-pre-empted claims. *Id.* at 2040. Perhaps the appropriate inquiry to draw such a line is found in *Morales'* assertion that Section 1305 was included in the ADA to "ensure that the states would not undo federal regulation with regulation of their own." *Id.* at 2034. State law claims which do not threaten to "undo federal regulation" should not be found to sufficiently relate to rates, routes and services.[26]

The Court made clear that it did not intend to "set out on a road that leads to pre-emption" of all state law claims touching on airline rates, routes and services. *Id.* at 2040. By declining to establish a bright-line rule, the

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[26] The *Morales* Court also analyzed whether the attorney general's claims had a "significant impact" or a "forbidden significant effect" on rates, routes and services. *Id.* at 2039, 2040. Several courts have followed *Morales's* "significant impact" inquiry. *See, e.g., Hodges v. Delta Airlines Inc.*, 4 F.3d 350, 355 (5th Cir. 1993) (tort remedies for personal injury did not have significant impact on services); *Doricent v. American Airlines Inc.*, No. 91-12084Y, 1993 U.S. Dist. LEXIS 15143, *16-*20 (D. Mass. Oct. 19, 1993) (claims for intentional infliction of emotional distress and violations of civil rights statute based on airline's treatment of passenger did not significantly impact rates, routes and services).

Court left to lower courts the evaluation of whether specific claims are pre-empted. That evaluation – whether the claims are tenuous, remote or peripheral to rates, routes and services or threaten to undo federal regulation – necessarily requires the lower court to evaluate the specific facts in each case. Thus, the *Morales* Court established a workable analytical framework.

2. Following the *Morales* Analysis, The Illinois Supreme Court Correctly Found That Plaintiffs' Breach of Contract Claim Was Not Pre-Empted.

Applying *Morales'* analytical framework, the Illinois Supreme Court held that Plaintiffs' ordinary claim for breach of the AAdvantage contract had only a "tangential" relation to American's rates, routes and services. Pet. App. at 7a. The Illinois Supreme Court evaluated the claim based on the facts alleged in the complaints, considering: (i) the mutual promises between American, its Program Participants and club members; (ii) American's retroactive change affecting earned credits; (iii) the Program's marketing purpose; (iv) the relief requested, limited to monetary damages; and (v) the fact that the AAdvantage Program was not essential to the airline's rates, routes or services. The court, following *Morales*, concluded that the claim was only tangentially connected to rates, routes and services and therefore was not pre-empted.

American ignores the enunciated basis for the Illinois Supreme Court's ruling, and suggests that Illinois created a requirement that Section 1305 pre-empts only those state law claims relating to "essential" airline operations.

While the court correctly characterized the AAdvantage program as not being "essential" to airline operations, its opinion makes clear that this characterization was merely one *fact* considered in the court's analysis, and not a new *legal* standard.

Unlike the proposed fare advertising regulations in *Morales*, Plaintiffs' straightforward breach of contract claim will neither "undo federal deregulation," *Morales*, 112 S. Ct. at 2034, nor impose restrictions on American's air transportation operations. American will continue to be free to advertise, set rates and offer routes and services in any way it pleases, subject only to its own voluntarily negotiated contracts.[27]

D. There Is A Strong Presumption Against Pre-Emption Of Plaintiffs' Breach of Contract Claim.

The Court starts by "presum[ing] that Congress did not intend to pre-empt areas of traditional state regulation". *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (strong presumption against pre-emption of claims traditionally governed by state law). This presumption derives from the judiciary's "respect for the separate spheres of governmental authority preserved in

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[27] American's arguments about the dangers of airlines being compelled to displace revenue-generating customers is irrelevant to Plaintiffs' claim, which seeks no more than *money damages* for the diminution in value of their previously earned AAdvantage credits.

our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

The presumption against pre-emption is applicable to the garden-variety breach of contract and consumer fraud claims asserted by Plaintiffs. *See, e.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) (common law remedy for breach of contract not pre-empted; only clear and express statement pre-empts traditional state claim); *ARC America*, 490 U.S. at 101 (state common law and statutory remedies against unfair business practices not pre-empted as "area traditionally regulated by the States"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, *reh'g denied*, 374 U.S. 858 (1963) (state regulation preventing the deception of consumers not pre-empted).

When the Court construes a pre-emption statute "any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947). The party asserting pre-emption has the burden of proving Congress' "clear and manifest" intent to pre-empt. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Traditional state common-law actions continue to exist unless Congress "expressly supplant[s]" them. *Id.*[28]

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[28] Contrary to amicus United Air Lines' argument, the presumption against pre-empting claims traditionally governed by state law applies to express pre-emption provisions. *See Cipollone*, 112 S. Ct. at 2618 (construing provision in light of presumption against pre-emption); *CSX Trans. Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) (Court should be "reluctant" to find pre-emption of state law claims; construing express pre-emption provision).

E. Allowing Compensatory Damages Claims To Go Forward Is Not Inconsistent With Pre-Emption of Injunctive Relief.

American argues that the damage claims cannot proceed because Congress intended to pre-empt Plaintiffs' claims for injunctive relief. *See* Pet. Brief at 24. Whether or not injunctive relief is pre-empted, ample evidence establishes that Congress intended the survival of common law state actions providing compensatory relief. As already noted, Sections 1381(b) and 1371(q)(2) expressly foresee private contracts. With no federal remedy, the ADA must have preserved state common law breach of contract actions. Congress, therefore, at a minimum, intended to "split" the remedies available from a state common law breach of contract action. *Silkwood*, 464 U.S. at 255.

Congress' principal concern in enacting Section 1305 was to ensure that states did not "undo" the statute by imposing regulations in the very areas that Congress had decided should not be subject to government interference. *Morales*, 112 S. Ct. at 2034. An injunction ordering an airline to seat certain passengers on particular flights could constitute impermissible government regulation. But requiring an airline to pay damages for a breach of contract would not impose any kind of restriction on the airline's rates, routes or services. Thus, it is reasonable to consider an injunctive claim separate from a damage claim for pre-emption analysis under Section 1305. *See*,

e.g., Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 301-02 (1976) (Court distinguished between causes of action based on relief, holding that common law compensatory damages were appropriate for state determination while injunctive relief was reserved for federal administrative action under Section 411).

American relies on *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959),[29] *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)[30] and *Cipollone v. Liggett*

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[29] This Court has previously explained that *Garmon* involves a special "presumption of Federal pre-emption" relating to the primary jurisdiction of the National Labor Relations Board. Because *Garmon* and its progeny have interpreted the NLRA as intending to fully occupy the labor field, these cases are not applicable here. In *Garmon* cases, the comprehensive reach of the NLRA creates conflicts with state laws and, hence, the need for pre-emption. *Brown v. Hotel & Rest. Emp. & Bart., Local 54*, 468 U.S. 491, 502 (1984); *English v. General Elec. Co.*, 496 U.S. 72, 86-87, n.8 (1990). Further, this Court has repeatedly held *Garmon* pre-emption analysis inapplicable in cases involving the "local interest exception." *International Ass'n of Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 138 (1976); *Sears, Roebuck & Co. v. Dist. Council of Carpenters*, 436 U.S. 180, 189 (1978) (state common law trespass action not pre-empted). Even in the labor area, the Court has refused to extend *Garmon* to pre-empt specific performance where "the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes. . . . " *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-19 (1974).

[30] *Ouellette* is distinguishable. There, Vermont landowners brought a nuisance suit seeking injunctive relief and damages against a paper mill in New York. The Clean Water Act ("CWA") specifically grants authority to the Federal Government and the *source State*. This Court held that any action brought in Vermont would frustrate the CWA but expressly noted that "[a]n action brought against IPC under New York nuisance law would not

Group, Inc., 112 S. Ct. 2608 (1992), as support for its argument that "this Court's pre-emption jurisprudence generally abjures distinctions based on the form of relief." Pet. Brief p. 24. These cases do not support American's position. In each case, the Court found that certain specific damage claims were an obstacle to federal laws or that federal law fully occupied the field. That is not the case here.

Under *Cipollone*, *only* state action which in fact implements state policy is pre-empted.[31] Compensatory damages for the breach of contract at bar does not involve the implementation of state policy, but instead makes available the traditional remedies for a breach of contract claim.[32] *Cipollone* supports the concept that common law

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frustrate the goals of the CWA." 479 U.S. at 498. The CWA, therefore, foresaw a forum for adjudication. The ADA, however, does not contain the explicit statutory language indicating a preference for a specific forum. No provision of the ADA expressly provides for federal adjudication of common law contract actions.

[31] In *Cipollone*, this Court held pre-empted those causes of action which relied on a breach of a duty imposed by state statute. This Court held that causes of action which relied upon a breach of a common law duty were not pre-empted.

[32] "[O]ur system of contract remedies is not directed at *compulsion of promisors* to prevent breach; it is aimed, instead, at *relief to promisees to redress* breach." E. Allen Farnsworth, *Contracts* § 12.1, at 840 (2d ed. 1990) (emphasis in original). Unlike other areas of law, contract law relates to "the nature and extent of the rights and duties that the parties themselves have created." *Id.* § 7.1, at 463. Even in the labor field, the *Garmon* pre-emption analysis has been held inapplicable to the enforcement of contracts voluntarily entered into. *Belknap, Inc. v. Hale*, 463 U.S. 491, 512 (1983).

contract actions survive pre-emption.[33] As Justice Stevens noted, "a contractual requirement, although only enforceable under state law, is not 'imposed' by the state, but rather is 'imposed' by the contracting party upon itself." *Cipollone*, 112 S. Ct. at 2622 n. 24.

Unlike *Garmon* and *Ouellette*, which involved pervasive federal regulatory schemes, this case involves *de*regulation and a statute that presumes continued state remedies. *Cf. Silkwood*, 464 U.S. at 256-58 (even with extensive federal regulations, damage claim could proceed). No evidence supports American's illogical contention that Congress intended to pre-empt compensatory damages for a breach of contract any more than it intended to pre-empt personal injury claims.

American further argues that compensatory damages have as regulatory an effect as injunctive relief and therefore should be pre-empted. However, none of the cases relied on by American supports the proposition that damage claims are pre-empted merely because they may possibly have regulatory effect. In each case the court found that the damage claims were either expressly pre-empted or impliedly pre-empted because they were an obstacle to federal law or federal law had fully occupied the field. Moreover, while *Garmon* held that regulation "can" be exerted through a damage award as well as an injunction,

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[33] Arguably, *Cipollone* supports the proposition that all state remedies for a breach of contract are permissible. *Accord Belknap*, 463 U.S. at 512 (implying specific performance available remedy); *William E. Arnold Co.*, 417 U.S. at 16-19 (1974) (holding *Garmon* did not pre-empt specific performance of contract).

it did not hold that *all* damage awards necessarily have such effect.

II. ERISA PRE-EMPTION SHOULD BE DISTINGUISHED FROM ADA PRE-EMPTION.

American suggests that in interpreting the ADA's pre-emption provision, the Court should adopt in its entirety its previous interpretations of ERISA's pre-emption provision. *See* Pet. Brief at 16, 18, 21, 24. While *Morales* compared the "relating to" language in the ADA to the "relating to" language in ERISA, the pre-emption analysis should not stop there. To determine whether Congress intended the ADA's pre-emption provision to have the same meaning as ERISA's pre-emption provision, the Court should compare not only two words in the pre-emption clauses, but also the rest of those provisions, other language in the statutes, and the purpose, civil enforcement schemes, and legislative history of the statutes.[34] An analysis of these factors demonstrates that while most breach of contract/enforcement actions are pre-empted under ERISA, Plaintiffs' claims are not pre-empted under the ADA.

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[34] This Court has limited the scope of ERISA pre-emption based on these factors. *See, e.g., Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 841 (1988) (ERISA did not pre-empt state's general garnishment statute even though it was applied to collect judgment against plan participants); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987) (state law requiring payment of severance benefits, which would normally fall within purview of ERISA, not pre-empted because only state laws that relate to benefit "plans" are pre-empted and because state law did not require establishment or maintenance of ongoing plan).

The explicit purpose of ERISA is "to protect *contractually* defined benefits." *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (emphasis added), *citing Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) and 29 U.S.C. § 1001. *See also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 & n.5 (1981) (Congress wanted to ensure in ERISA that workers received contractual or promised benefits), *citing Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). This purpose, along with a detailed federal scheme to enforce contracts, supports the Court's conclusion that Congress intended to pre-empt state law breach of contract actions in areas covered by ERISA.

In contrast, the express purpose of the ADA is wholly unrelated to the enforcement of contractual obligations at the federal level. Rather, the ADA's purpose is to promote "maximum reliance on competitive market forces," and to further "efficiency, innovation, and low prices" as well as the "variety [and] quality . . . of air transportation services." *See Morales*, 112 S. Ct. at 2034, *quoting*, 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9). This purpose is served – not impeded – by state law breach of contract claims that seek only to enforce terms voluntarily agreed to by an airline.

The ADA and ERISA also differ markedly with respect to the enforcement schemes to remedy breaches of contract. Under ERISA, Congress crafted a "detailed," "comprehensive," and "carefully integrated" civil claims and enforcement procedure. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); 29 U.S.C. § 1132. *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (enforcement scheme is "essential tool" to accomplish ERISA's purpose). The existence of this comprehensive

civil enforcement scheme has been a critical factor in finding that ERISA's pre-emption clause sweeps widely. *See Ingersoll-Rand*, 498 U.S. at 143-45 (finding ERISA's comprehensive and detailed civil enforcement mechanism to be a "special feature" supporting pre-emption of common law wrongful discharge action).

The ADA contains no such "detailed, "comprehensive," and "carefully integrated" civil enforcement scheme to enforce contractual rights. At the same time, the ADA assumes the continued existence of contracts. *See supra* at 16-17. The lack of enforcement scheme demonstrates that Congress expected that state law breach of contract actions would provide the mechanism to deal with breach of contract claims, so long as the claims did not conflict with the ADA's deregulatory purpose.

American contends that Section 411 (49 U.S.C. App. Section 1381) and Section 1371(q)(2) provide "ample authority for the DOT to protect consumers should the DOT determine such protection is needed". Pet. Brief at 31. But those sections are discretionary to the DOT, and contains no reference to complaints from passengers, let alone members of frequent flyer clubs. As described *supra* at 16-17, 22-23, those sections provide no mechanism for consumers to pursue their rights.[35] The DOT itself has rejected American's contention. *See supra* at 23.[36]

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[35] In contrast, ERISA provides for both administrative enforcement, to address cases with broad policy implications, and private enforcement lawsuits, to address run-of-the-mill contract disputes.

[36] The legislative history of the ADA and ERISA highlights their differences on pre-emption. ERISA's legislative history

III. SECTION 1305(a)(1) DOES NOT PRE-EMPT PLAINTIFFS' CONSUMER FRAUD ACT CLAIM.

American and the Solicitor General both misperceive the nature and scope of Plaintiffs' claim under the Illinois Consumer Fraud and Deceptive Business Practices Act. 815 I.L.C.S. § 505/1 *et seq.* Like the claim for common law breach of contract, this claim does not relate to an airline's rates, routes or services except in a manner which is tenuous, remote and peripheral. *See supra* at 24-27, 30-31. Plaintiffs allege that American's conduct, which constituted a breach of the contract between members and the AAdvantage Program, included a deceptive practice subject to money damages under the Consumer Fraud Act.[37]

Unlike the regulation at issue in *Morales*, the Consumer Fraud Act claim does not require, nor purport to

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demonstrates that Congress intended to create a federal scheme to replace state law claims relating to breach of employee benefit contracts. *See Pilot Life*, 481 U.S. at 46 (citing Congressional Record statements). In contrast, the ADA's legislative history contains no evidence that Congress intended Section 1305 to pre-empt state law claims relating to private contracts. It indicates only a legislative intent to prevent states from enforcing normative utility-type regulations on airlines' rates, routes and services. *See supra* at 19.

[37] The Solicitor General incorrectly argues that the Consumer Fraud Act claim challenges the adequacy of American's prior notice. Sol. Gen. Br. at 10. However, the claim is based on the fact that offering a triple miles bonus, when American already had plans to institute capacity control restrictions and blackout dates, was a deceptive practice.

regulate,[38] either American's ability to determine the terms of the AAdvantage Program or the content of its communications concerning the Program. American's deceptive treatment of the AAdvantage contracts has nothing whatsoever to do with any legitimate industry-wide practice of airlines. Imposing liability for American's deceptive conduct under Illinois law would not "significantly impact" American's ability to administer its services or set rates.

Plaintiffs' claim would, however, require American to conduct itself with respect to the AAdvantage contracts without unfair deceptive business practices. Congress intended exactly that impact when it enacted Section 411 in 1938. Under Section 411, states share with the federal government regulatory authority over unfair and deceptive business practices. When Congress passed the FAA in 1958, it reenacted Section 411 with the shared authority intact. Congress again left the section unchanged when it adopted ADA in 1978. Then, in the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703, Congress transferred administrative responsibility over Section 411 from the CAB to the DOT, again without altering its substance.

Thus, from its initial enactment through today, Section 411 has served to supplement, not displace, statutory causes of action challenging unfair and deceptive practices in the airline industry. *Nader v. Allegheny Airlines,*

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[38] Not all state regulation of airline advertising, let alone regulation of unfair and deceptive business practices, is pre-empted under Section 1305, especially if it fails the "significant impact" inquiry of *Morales*. 112 S. Ct. at 2040.

Inc., 426 U.S. 290, 303 (1976) (Section 411 "does not represent the only, or best, response to all challenged carrier actions that result in *private* wrongs"). This result is consistent with the interpretation of Section 411's model – Section 5 of the Federal Trade Commission Act – which coexists with state laws against deceptive trade practices. *See Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

Plaintiffs' Consumer Fraud Act claim for damages does not threaten the federal goals of deregulation. Rather, concurrent federal and state jurisdiction to challenge unfair or deceptive practices, like the practice here, has been the norm since Congress first enacted Section 411. Since the Consumer Fraud Act claim, like the contract claim, is at most only tenuously connected to rates, routes or services, it is not pre-empted under Section 1305 or under *Morales*.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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